

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7156

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7156



Mildred L. Wiackley,

Plaintiff-Appellant,

-against-

Nelson A. Rockefeller, Abby Rockefeller,
Lawrence, David, and John Rockefeller,
Mary Tod Hunter Clark, Anne Schuyler Cox,
Howard Cox, Edward Finch Cox, Federal
Government of the U.S.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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New York, N.Y. 10005
Attorneys for Defendants-Appellees,
Nelson A. Rockefeller
Abby Rockefeller Mauze
Laurence Rockefeller
David Rockefeller
John D. Rockefeller 3rd

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TABLE OF AUTHORITIES

Case: Adickes v. S.H. Kress & Co., 398 U.S.
144 (1970)

Statute: 42 U.S.C. § 1983

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Docket No. 75-7156

Mildred L. Wiackley,

Plaintiff-Appellant,

-against-

Nelson A. Rockefeller, Abby
Rockefeller, Lawrence, David
and John Rockefeller, Mary Tod
Hunter Clark, Anne Schuyler Cox,
Howard Cox, Edward Finch Cox,
Federal Government of the U.S.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

This is an appeal from an order
of the United States District
Court, Southern District of New
York (Knapp, J.), dated January 31,
1975 and filed February 4, 1975,

which order dismissed the complaint herein for failure to state a claim upon which relief could be granted.

Statement of the Issue

Whether as against defendants-appellees, the complaint states a claim upon which relief can be granted?

Statement of the Case

Plaintiff commenced this action on January 29, 1975. The complaint purports to state a claim under 42 U.S.C. § 1983.

Defendants-appellees, Nelson A. Rockefeller, Abby Rockefeller Mauze, Laurence Rockefeller, David Rockefeller and John D. Rockefeller 3rd, were served with the summons and complaint on February 4, 1975. On that same day, the District Court entered an order dismissing the complaint on the ground that

the complaint did not set forth facts upon which the Court could grant relief.

On February 13, 1975, without knowledge of the dismissal, defendants-appellees sought to move for dismissal of the complaint pursuant to F.R.C.P. 12(b)(6). At that time, defendants-appellees discovered that the complaint had already been dismissed.

On February 20, 1975, the Court's order with notice of entry was served on plaintiff-appellant. On February 28, 1975 plaintiff-appellant filed her notice of appeal.

Point I

THE COMPLAINT WAS PROPERLY DISMISSED

The complaint fails to state a claim upon which relief can be granted.

The caption of the complaint indicates that plaintiff's claim is based on 42 U.S.C.

§ 1983, and the final page thereof requests relief pursuant to the same statutory provision. Other than those two references there are no clues in the complaint as to the nature of the claim.

Section 1983 of 42 U.S.C. provides as follows:

"Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To state a claim under such section it must be alleged that a defendant acted under color of state law and that in so acting deprived plaintiff of rights secured by the United States Constitution and laws. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). No

such allegations are made in the complaint.
Nor could such allegations be made. None of
the substantive paragraphs of the complaint
relate to actions by defendants-appellees.

Conclusion

The order of the District Court should
be affirmed, with costs.

Dated: April 28, 1975

Respectfully submitted,

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Nelson A. Rockefeller
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Laurence Rockefeller
David Rockefeller
John D. Rockefeller 3rd

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILDRED WIACKLEY,

Plaintiff-Appellant,

-against-

NELSON ROCKEFELLER,
ABBY ROCKEFELLER, LAWRENCE, DAVID
AND JOHN ROCKEFELLER, MARY TOD HUNTER
CLARK, ANNE SCHUYLER COX, HOWARD COX,
EDWARD FINCH COX, FEDERAL GOVERNMENT
OF THE U.S.,

Defendants-Appellees.

AFFIDAVIT OF
SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CLIFFORD N. RIBNER, being duly sworn, deposes and says:

I am over the age of 18 years and am not a party to this
action.

On April 30, 1975, I served the Brief for Defendants-
Appellees on Mildred Wiackley, by depositing two true copies
thereof, securely enclosed in a post-paid wrapper, addressed to
her at Box 82, Peter Stuyvesant Station, New York, New York 10009,
in a mailbox maintained by the government of the United States
at One Chase Manhattan Plaza, New York, New York.

Clifford N. Ribner

Sworn to before me this

1st day of May, 1975.

Steven L. Kroleski

STEVEN L. KROLESKI
NOTARY PUBLIC, State of New York
No. 41-2205558
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977